IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 425 OF 2006

Mr Dayanand B. Nayak ...Applicant.

V/s

State of Maharashtra ...Respondent.

Shri Shirish Gupte, Sr. Advocate with S.V. Marwadi for the applicant.

Shri S.R. Borulkar, P.P. with Shri D.S. Mahispur, APP and Ms. Rajeshree M. Gadhvi, APP for the State.

ALONG WITH
CRIMINAL APPLICATION NO.426 OF 2006

Mrs. Komal Daya Nayak ...Applicant.

V/s

State of Maharashtra ...Respondent.
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Shri A.P. Mundargi, Sr. Advocate with Shri S.V. Marwadi for the applicant.

Shri S.R. Borulkar, P.P. with Shri D.S. Mahispur, APP and Ms. Rajeshree M. Gadhvi, APP for the State.

ALONG WITH
CRIMINAL APPLICATION NO.427 OF 2006

Rajendra Prabhakar Padte ...Applicant.

V/s

The State of Maharashtra ...Respondent.

Shri S.V. Marwadi with Shri Ganesh Gole for the applicant.

Shri S.R. Borulkar, P.P. with Shri D.S. Mahispur, APP and Ms. Rajeshree M. Gadhvi, APP for the State.

CORAM: V.M. KANADE, J.

DATE: 7th & 8th February, 2006

P.C:

1. Heard the learned Counsel appearing on behalf of each of the applicants and the learned Chief Public Prosecutor for the State.

2. All these three applications can be disposed of by a common order since the facts in all the three cases are interlinked and secondly the arguments have been advanced by the learned Counsel for the applicants in these three applications one after another and the learned Chief Public Prosecutor has given reply to all the three applications which have been filed. Essentially, the relief which is claimed in all these three applications is that the applicants are seeking an order of anticipatory bail in the event of their arrest in connection with the FIR which is filed on 20/1/2006 in which it is inter alia alleged that the applicant Shri Dayanand Nayak has misused his position as a public servant and other two applicants viz. Smt. Komal Dayanand Nayak - the wife of the public servant and Shri Padte - the applicant in the third application, had abetted the public servant in amassing wealth which was disproportionate to the

known sources of his income and, therefore, the public servant has committed an offence punishable under section 13(1)(e) of the Prevention of Corruption Act, 1988 (hereinafter called "the said Act") and the other two applicants viz. the wife of the public servant and his alleged friend Shri Padte had abetted him in the commission of the said offence and were, therefore, liable to be prosecuted under the provisions of section 13(1)(e) of the said Act read with section 109 of the Indian Penal Code.

SUBMISSIONS:

3. Shri Gupte, the learned Counsel appearing on behalf of the public servant submitted that the perusal of the FIR discloses that sanction to investigate was granted long time ago and that the investigation was complete as is disclosed from the details which are mentioned in the FIR and, therefore, further custodial interrogation of the public servant was not at all necessary. He further submitted that the public servant had already been suspended and he had no access to the documents or files which are already seized by the Investigating Officer and, therefore, the question of tampering with these documents also did not arise. He invited my attention

to the FIR and the details which were given in the FIR regarding various allegations which were made against the public servant and his wife and Shri Padte. He submitted that in cases where the allegations are made under the provisions of section 13(1)(e), custodial interrogation rarely takes place and the applicant is produced before the special court and he is released on bail as a matter of course since there is no question of there being recovery at the instance of the accused or for the purpose of interrogating him personally in respect of the documents which are already seized. He further submitted that apart from the fact that custodial interrogation was not necessary, in the present case, the various events which are mentioned in the application disclose that the action which was being initiated against him was nothing but a malafide action at the behest of certain Officials in the Department and as a result of an enmity which was created between the public servant and the underworld elements which were offended as a result of his meritorious service and, therefore, an attempt was made to remove him from the office. He further submitted that, initially, the allegations were made against him by one Ketan Tirodkar who is an accused in MCOC Case which is still pending before the Special Court, who had made allegations against the

present applicant - public servant that he had links with the underworld and that he had donated an amount of Rs 1 crore to a School at his native place which was being run in the name of his mother. He submitted that after these allegations were made, inquiry was made at the highest level in the Department and he was exonerated in the said inquiry by the high ranking Officer and in the said inquiry it transpired that only an amount of Rs 10,000/- was donated by the public servant to the said School and none of the donors had claimed that this amount had been paid on account of any force or threat or under coercion from the public servant. He submitted that after the said journalist - Ketan Tirodkar failed in his attempt to implicate the present applicant in the said case, another allegation was made that the applicant - Shri Dayanand Nayak had links with the underworld and, therefore, the provisions of MCOC Act should be made applicable to him. He submitted that in the case of these allegations also an inquiry was made pursuant to the directions which were given by the High Level Committee and in the said inquiry also, the applicant Shri Dayanand Nayak was exonerated and it was established that he had no links with the underworld and, therefore, the provisions of MCOC Act were not made applicable to him. Shri Gupte, the learned

Counsel, submitted that after having failed in the second attempt to implicate the present applicant the said Ketan Tirodkar and others did not want to leave any stone unturned to ensure that the applicant is removed from the service and, therefore, he submitted that the Writ Petition bearing No.64 of 2006 was filed by the said Ketan Tirodkar before the Division Bench of this Court in which the following prayers were made.

A] Ordering the Bureau of Anti-corruption to deposit the records and proceedings of the investigations against PSI Nayak and his wife with this Hon'ble Court forthwith;

B] Ordering the Director Genera Anti-corruption to file affidavit as to whether there is a prima-facie case against PSI Nayak and his wife and the figures and numbers given by me in this petition are true;

C] Ordering immediate suspension and arrest of PSI Nayak; if my contentions are corroborated by the material submitted by the State in this regard.

D] Ordering the Director General of Police, State to offer a tightest possible security cover at my residence and for me and my parents till the private complaint proceedings are being conducted in the Court of MCOCA in Special Case 4 of 2003;"

E] Any other such relief as this Hon'ble Court may think proper in the interest of justice."

He submitted that, thereafter, the Division Bench of this Court on 31/1/2006 passed the following order:-

"P.C.

"1. We have heard the Petitioner present in person and Mr. Borulkar learned P.P. as well as Mrs. Kantharia A.P.P. for the State.

2. The Petitioner has expressed his serious apprehensions regarding the ongoing investigations by the Anti Corruption Bureau into the disproportionate assets allegedly held/possessed by Mr. Daya Nayak, Police Sub-Inspector under the Mumbai Commissionarate and his family members and therefore, he has

prayed for directions in that regard. We have been informed that on the basis of the preliminary report submitted, FIR has been lodged against Mr. Nayak and Mr. Bhonge, Asstt. Commissioner of Police ACB Mumbai has been appointed as the Investigating Officer. We are prima facie satisfied that the issues raised by the Petitioner require considerations.

Hence rule.

3. So far as the issue of police protection to the Petitioner is concerned the learned P.P. on instructions states that the Order passed by this Court on 4th November 2003 in that regard in Criminal Writ Petition No. 1573 of 2003 will be followed and implemented by the Police Commissioner, Thane. We order accordingly and at the cost of the State.

. The Director General of Anti Corruption Bureau will place before us the progress report into the ongoing investigations every 2 weeks and we are sure that the Investigating Officer and/or the Director General, Anti

Corruption Bureau would take appropriate steps, for seizure/attachment of all the properties concerned. In case the Petitioner approaches the I.O., his statement shall be recorded as part of the ongoing investigation.

. Liberty to apply for the earlier disposal of the Petition, on completion of the investigation."

He further submitted that after the aforesaid Writ Petition was filed, the present complaint had been filed on 20/1/2006. He submitted that, therefore, there was sufficient material which smacked of malafide intention on the part of the said journalist Shri Ketan Tirodkar who himself was an accused in MCOC Case and had, on his own admission, links with the underworld gangster Chhota Shakil. The learned Counsel also invited my attention to the judgment of the Supreme Court in the case of Gurbaksh Singh Sibbia etc. vs The State of Punjab reported in **AIR 1980 SC 1632**. He submitted that the Supreme Court while considering the guide lines which were laid down by the Full Bench of the Punjab and Haryana High Court had, in terms, set aside the guide lines which were laid down by the Full Bench of Punjab and Haryana High

Court in respect of the cases pertaining to the Prevention of Corruption act and held that such a premise or guide line could not be laid down and what was essential in a case where an application under section 438 is filed was to see whether there was sufficient material on record to indicate that the malafide action was being initiated. He also invited my attention to the other observations of the Supreme Court in the said judgment and the guide lines which were laid down by the Supreme Court while considering the said case. He, therefore, submitted that this is a fit case where investigation was already going on for a period of more than one year and, therefore, the question of custodial interrogation did not arise. He further pointed out that the applicant Dayanand Nayak was made a target by various other Officials who had links with the underworld and, therefore, if the applicant is taken into custody, there is every possibility of there being danger to his life and to the life of his wife and, therefore, he submitted that the investigation could be carried out without the applicant and his wife being taken into custody.

4. Shri Mundargi, learned Counsel appearing on behalf of Smt. Komal Dayanand Nayak - wife of Shri Dayanand Nayak, submitted that so far as the said applicant is

concerned, she was employed since 1989 and had worked initially at Chennai with one P. Rajaratnam and, thereafter, she was transferred to Mumbai and was working with the Company known as Ojus Housing Finance Pvt. Ltd. He submitted that the FIR discloses that the income of the said applicant prior to 2000-2001 had not been taken into consideration though she had worked since 1989. He further submitted that all the entries in the accounts of the said Company - Ojus Housing Finance Pvt. Ltd. were the entries where monies were deposited by cheques. He submitted that though Ojus Housing Finance Pvt. Ltd. was purchased by the wife of the applicant - Dayanand Nayak in the year 2002, subsequently, she had resigned from the said Company and an intimation to that effect had been given to the Registrar of Companies. He pointed out from the various allegations which were made in the FIR against his client that the said transactions were in no way concerned with the public servant and that they were transactions where the other persons viz. P. Rajaratnam, Manivelan and Naidu were involved who had made representations to various persons in Punjab and other places and who had deposited the said amount in the accounts of the said Company. Some cheques were dishonoured. Some cheques were honoured and the amounts were withdrawn by her in cash and payments had

been made. He submitted that in respect of the amounts which were received from the persons from Punjab are concerned, a complaint had been registered against various persons and the investigation had been carried out separately in respect of the assurances which were given by Shri Naidu, Manivelan and others and the applicant Mrs. Komal Dayanand Nayak had not met the complainant in the said complaint and she neither had any concern with the said transaction nor had her husband any connection with the said transaction as his name also had not figured anywhere in the complaint which was filed by the people in Punjab. He submitted that it was not a case of Benami transactions as the persons who had deposited the amount from Punjab were not fictitious persons but their existence was beyond doubt and they had prosecuted the persons who were responsible for perpetrating the fraud. He immediately invited my attention to the other entries which were made in the FIR and strenuously submitted that all those entries indicated, at the highest, that certain cheques were deposited in the Bank Accounts of the Company which cheques, though the amounts involved were huge, had been dishonoured. He submitted that all these transactions did not in any way establish any link with the public servant - Dayanand Nayak and,

therefore, it could not be said that Smt. Komal Nayak - the applicant had abetted her husband in acquiring and amassing the wealth. He invited my attention to the judgment of the Supreme Court in the case of D.S. Chennai Vs. K. Inbasagaran reported in 2006 All M.R. (Cri) 304 (S.C.) wherein the Supreme Court had held that if the wife of the public servant had taken responsibility towards the unaccounted money which was found in the house which was raided by the party of the Income-tax Department, that was sufficient explanation, though the wife, in her statement, had admitted that she had committed a breach of the provisions of the Income-tax Act or had committed breach of other provisions of law by selling machinery of the Company. He invited my attention to the observations made by the Supreme Court in the said case. He further submitted that so far as the three flats which were said to have been acquired by the wife of the applicant, he submitted that the documentary evidence indicated that one was taken on lease, the other flat was purchased for a consideration of Rs 10 lakhs which was, in fact, the value which was arrived at on the basis of 300 times rent of the said flat and lastly the third flat had been purchased by her by obtaining a loan from the Bank and part of the amount was paid in cash and the

said amount of loan had not been repaid. He submitted that, therefore, so far as these three properties are concerned, there is sufficient material to indicate that the allegations made by the Investigating Officer in the FIR was prima facie not correct and that a fishing and roving inquiry was being made in respect of the affairs of the Company where the applicant - Smt. Komal Nayak had interest alongwith some other persons who were unconnected with the public servant Shri Dayanand Nayak. He submitted that the custodial interrogation of the applicant who is the wife of the public servant was not essential and, therefore, she was entitled to be released on bail in the event of her arrest in connection with the said case.

5. Shri Marwadi, the learned Counsel appearing on behalf of Shri Padte in the third application submitted that there were three allegations which were levelled against the applicant Shri Padte; one was regarding acquisition of Sumo Jeep and a mercedez car and the second in respect of the amount of Rs 13 lakhs which were received by him after withdrawing the same from the Bank and third was in respect of the flat where he was residing. Shri Borulkar, the learned Chief Public Prosecutor, at this stage, clarified that so far as the flat which was in occupation of Shri

Padte is concerned, no allegations were made and, therefore, Shri Marwadi did not address the Court on that aspect of the matter. So far as the two vehicles i.e. Sumo Jeep and Mercedez Car are concerned it is submitted that Mercedez Car was purchased in 2002 on behalf of Shri Manivelan, Director of Deve Paints Ltd., who did not have documentary evidence to indicate his residence in Mumbai and, therefore, for RTO purpose the said Car was purchased by him at Mumbai since he was residing in Mumbai and had documents to that effect and later on the said Car had been sold at the instance of Manivelan. He further submitted that so far as Sumo Jeep is concerned, he had purchased the same on loan and there was sufficient documentary evidence to that effect. So far as the amount of Rs 13 lakh was concerned, he submitted that the applicant Shri Padte had sufficient income to indicate how he had acquired that amount.

6. Shri Marwadi, the learned Counsel appearing on behalf of the applicant Shri Padte, adopted the legal submissions made by the learned Counsel Shri Gupte and Shri Mundargi on the question of grant of anticipatory bail in cases of the Prevention of Corruption Act.

7. Shri Borulkar, the learned Chief Public Prosecutor very vehemently, strongly and stoutly opposed the anticipatory bail applications which are filed by the applicants. He submitted that filing of FIR was just an initial step from which the investigation was initiated and that was not a final step as the FIR had been filed after the discreet investigation was made on instructions from the Competent Authority and material had been acquired and only after the Investigating Officer was satisfied that certain material exists, the said FIR had been filed. He, at the outset, denied the allegations made by the learned Counsel Shri Gupte that this FIR has been filed as a result of the allegations which were made by Shri Ketan Tirodkar. He submitted that, at the most, it was a mere coincidence that the Writ Petition had been filed by Shri Ketan Tirodkar in this Court on 16/1/2006 and that the complaint had been lodged on 20/1/2006. He submitted that the perusal of the FIR clearly indicated that there were certain unanswered questions which needed to be probed further and this was possible only after custodial interrogation of the applicants was done by the persons who are expert in the field so that certain answers could be solicited to these unanswered questions. He submitted that, essentially, the firms which were set up by the wife

of the public servant were fictitious firms which had been established for the purpose of collecting funds and illegal gratification which was thereafter converted and the money laundering was made through these firms. He invited my attention to various instances which were mentioned in the FIR and particularly the statement which was made by Shri Padte wherein he had stated that the cheque which was received by Smt. Komal Dayanand Nayak was deposited in the Bank and Shri Dayanand Nayak and his wife had asked him to withdraw the amount of Rs 13 lakhs. He submitted that this was one instance which was reflected from the said FIR and it was essential to find out whether there were more such instances of the money removed from the Banks through third person for the benefit of the public servant Shri Dayanand Nayak and his wife Smt. Komal Dayanand Nayak. He submitted that the accounts of the Company showed that huge cheques for the amount of Rs 15 crores, 30 crores etc. were deposited and that though these cheques were dishonoured, no steps appear to have been taken by Smt. Komal Dayanand Nayak for recovery of these amounts or no information was forthcoming regarding the further steps in respect of the said transaction. He submitted that even in respect of the monies which were received from Punjab, all these amounts were

withdrawn only by one person viz. Smt. Komal Dayanand Nayak in cash and it was not clear as to what had happened to the amount which was withdrawn. He submitted that though it was alleged that the applicant - Smt. Komal Nayak was only a employee working with the said P. Rajaratnam, subsequently she had been taken as a Director and, thereafter, she had purchased the Company for a sum of Rs 20,000/- and though there was one other Director viz. the brother-in-law of the public servant Shri Dayanand Nayak, the entire account was operated only by Smt. Komal Dayanand Nayak. He submitted that, therefore, it was essential to further interrogate the applicants in order to find out the actual nature of the transaction and that this was possible only after the applicants were interrogated by the Police. He, thereafter, submitted in reply to the submissions made by the learned Counsel for the applicants on the question of malafide and submitted that if the Police Department wanted to take revenge against the applicant Shri Dayanand Nayak, they could have very well involved him in two complaints which were filed against him. He submitted that particularly in the case where a complaint was sought to be lodged against Shri Dayanand Nayak under the provisions of MCOC Act, if at all the intention of the Department was

malafide, they could have involved him in the said offence. However, the Department did not take any such steps and when no material was found against the public servant, he submitted that the applicant Shri Dayanand Nayak had been exonerated in the inquiries which were initiated by the High Level Committee. He submitted that if the intention of the Department was to eliminate him, they could have done so in the earlier two inquiries. He submitted that the present case, however, had been filed after the initial investigation had been carried out and though the applicant may have been earlier exonerated, it was in case of an inquiry which was launched on other issues and, therefore, the inquiry could not be equated with the investigation of a criminal complaint which was lodged under the provisions of the Prevention of Corruption Act. He submitted that, therefore, the allegation regarding malafide was not made out and, therefore, there was no material to indicate that the Department had acted in a malafide manner. He relied upon two judgments of the Supreme Court in the case of K.K. Jerath Vs. Union Territory, Chandigarh and Others reported in **1998 SCC (Cri) 809** and in the case of State of A.P. Vs. Bimal Krishna Kundu and another reported in **(1997) 8 SCC 104** in support of his submissions wherein the Supreme Court has held that

wherever the Government felt, in public interest, it was essential to investigate into the case, the Government should be allowed to do so and the High Court and Sessions Court should not put any hindrance on the investigation by granting an order of anticipatory bail under section 438. In other case where there was a scam in respect of the leakage of papers in respect of the Andhra Pradesh Public Service Commission, the Supreme Court in para 12 of the said judgment observed that if the accused in the case was armed with pre-arrest warrant, he could preempt the investigation which ought to have been carried out in the public interest and he submitted that therefore observations made by the Supreme Court in both these two judgments were clearly applicable to the facts of the present case. So far as the third applicant Shri Padte is concerned, he submitted that the applicant was merely a plumber when he started his career and had become rich enough to buy Mercedez Car and Sumo Jeep and had withdrawn an amount of Rs 13 lakhs at the behest of the public servant Dayanand Nayak and his wife Smt. Komal Dayanand Nayak and, therefore, it was improbable that such a person could lay his hands on such a big amount unless the same was provided by the public servant who was alleged to be his friend.

8. In rejoinder, Shri Gupte the learned Counsel appearing on behalf of the applicant - Shri Dayanand Nayak, submitted that there was a danger to the life of the applicant and he sought to rely upon the two documents which were shown to the Court; one was a letter which was written and the other was a transcript of telephonic conversation. He submitted that he did not wish to disclose these two documents on account of obvious reasons of the contents of the said letter. These letters were shown to me by Shri Gupte, the learned Counsel in the presence of Chief Public Prosecutor Shri Borulkar who has also gone through the said letters. Shri Gupte, the learned Counsel submitted that this was only one instance to indicate that the life of the applicant Shri Dayanand Nayak was in grave danger and there was every possibility that after his arrest, an attempt may be made on the life of the applicant Shri Dayanand Nayak and his family. He submitted that the allegations of malafide were not made in the air but there was concrete and material evidence to that effect to indicate such an apprehension so far as the applicants

are concerned.

FINDINGS AND CONCLUSION:

9. I have heard the learned Senior Counsel Shri Gupte, Senior Counsel Shri Mundargi and the learned Counsel Shri Marwadi appearing on behalf of the applicants and Shri Borulkar, the learned Chief Public Prosecutor on behalf of the State at length. I have given my anxious consideration to the submissions made by the learned Counsel appearing on behalf of both the parties. Before I consider the rival submissions which are made by the Counsel on either side I feel it would be relevant to consider the scope and power which has to be exercised by this Court in an application which is filed under section 438 of the Code of Criminal Procedure.

10. Section 438 of the Code of Criminal Procedure was introduced and inserted in Cr.P.C. after there was much deliberation on this subject. Initially, 41st Law Commission in the year 1969 submitted its report and recommended the inclusion of the provisions and a draft of that section was also included in the said report. In that report, however, the Law Commission felt that the conditions and circumstances under which the power to grant the anticipatory bail could not be

codified for obvious reasons. Thereafter, the next Law Commission also agreed and reiterated the need to incorporate such a provision since it felt that there was increase in the number of frivolous cases being filed against the individuals of various categories and, therefore, in order to avoid the harassment and consequential ill effects of such arrest after such complaints are filed, it felt that over and above the provisions of section 437 and 439, it was necessary to introduce the provision of anticipatory bail. This Law Commission also observed that no strait jacket formula could be evolved for the purpose of laying down the categories of cases under which this power should be exercised or should not be exercised by the courts and the Commission felt that a discretion ought to be given to the higher judiciary viz. High Court and the subordinate Court i.e. Sessions Court, which would, in the facts and circumstances of each case would be best suited to exercise the said discretion judiciously. Thereafter, the Full Bench of the Punjab and Haryana High Court gave a judgement in the case of Gurubaksh Singh Sibia v. State of Punjab, reported in **AIR 1978 Punjab and Haryana 1** in which it laid down the guidelines of grant or refusal of anticipatory bail. After this, the matter travelled to the Supreme Court. The Supreme Court considered in depth the

principal question and issue which was involved in the case which came up before it and set aside the observations which were made by the Punjab and Haryana High Court. The ratio laid down by the Supreme Court in the case of Gurubaksh Singh Sibbia etc. vs. The State of Punjab reported in **AIR 1980 SC 1632** holds good till today and the Supreme Court in its judgment in the said case has considered the various aspects regarding the conditions and circumstances which have to be kept in mind by the Court while granting an anticipatory bail. Thereafter, on various occasions this power has been exercised by the Sessions Court and the High Court and the matters have travelled to the Supreme Court which had an occasion to consider the cases of anticipatory bail granted by the High Court and the Sessions Court and various observations have been made by the Supreme Court in these cases.

11. Before I consider the ratio laid down by the Supreme Court in the case of Gurbaksh Singh Sibbia etc. (supra), I would like to reiterate the law regarding the law of precedent and the binding value of the judgments of the Supreme Court. The Supreme Court in catena of cases and recently the Supreme Court in the case of M/s Zee Tele Films Ltd. and another vs. Union of India and others reported in

2005 AIR SCW 2895 has observed that the judgment delivered by the Supreme Court and the ratio which is laid down by the Supreme Court should not be read as a statute or a provision in the statute and that each judgment has to be considered on the facts of the said case and if the facts and circumstances differ from the case at hand, the Court accordingly will have to determine whether the ratio in the said case would apply to the facts which are being considered in the said case. The Supreme Court in its judgment in the case of M/s Zee Telefilms Ltd. (supra) in paragraphs 275 and 276 observed as under.

> "275. Are we bound hands and feet by Pradeep Kumar Biswas (supra)?. The answer to the question must be found in the law of precedent. A decision, it is trite, should not be read as a statute. A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well-known, must be read in

its entirety and the observations made therein should receive consideration in the light of the questions raised before it [See Punjab National Bank v. R.L. Vaid and Others, (2004) 7 SCC 698]"

"276. Although, decisions are galore on this point, we may refer to a recent one in State of Gujarat and others v. Akhil Gujarat Pravasi V.S. Mahamandal and Others [AIR 2004 SC 3894] wherein this Court held:

".....It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used."

12. Keeping in view the observations made by the Supreme Court on the law of precedent, I would like to take into consideration the ratio which is laid down in the case of Gurubaksh Singh Sibbia etc. (supra).

13. In the said case the charges of corruption were levelled against the Minister of Punjab and Haryana Government and an application for anticipatory bail was filed which was ultimately rejected by the Punjab

and Haryana High Court and the matter went to the Supreme Court. It would be profitable to consider the observations which are made by the Supreme Court in the said judgment. The Supreme Court observed in para 1 of the said judgment as under:-

> "These appeals by Special Leave involve a question of great public importance bearing, at once, on personal liberty and the investigational powers of the police. The society has a vital stake in both of these interests, though their relative importance at any given time depends upon the complexion and restraints of political conditions. Our task in these appeals is how best to balance these interests while determining the scope of S. 438 of the Cr.P.C. 1973 (Act No.2 of 1974)"

The Supreme Court after considering the historical background of the said provision and the submissions made by the learned Counsel on both sides and also reproducing the conditions which were imposed by the Full Bench of Punjab and Haryana High Court has observed in para 12 of its judgment as under:-

"12.....

The provisions of section 437 and 439 furnished a convenient model for the legislature to copy while enaction S. 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully. Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself,

since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail."

The Supreme Court, thereafter, in para 14 of its judgment while considering the question of discretion, observed as under:-

"14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the

> conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges."

The Supreme Court, thereafter, considered the 7th proposition which was laid down by the Full Bench of the Punjab and Haryana High Court and considered the question of malafides which are alleged in the application for anticipatory bail. The Supreme Court

first reproduced the 7 conditions laid down by the Full Bench of the Punjab and Haryana High Court and in para 16 if its judgment observed as under:-

> "16. A close look at some of the rules in the eighth-point code formulated by the High Court will show how difficult it is to apply them in practice. The seventh proposition says: "The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under S. 438 of the Code should not be exercised."

The Supreme Court has further observed in para 17 of the said judgment as under:-

> "17.....The eighth proposition framed by the High Court says: Mere general allegations of mala fides in the petition are inadequate. The Court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless".

Does this rule mean, and that is the argument of the learned Additional Solicitor General, that anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusations are mala fide? It is understandable that if mala fides are shown, anticipatory bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the accusation is shown to be mala fide. This, truly, is the risk involved in framing rules by judicial construction. Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides a safeguard against its abuse."

The Supreme Court in para 19 of its judgment has observed as under:-

"19.....

For similar reasons, we are unable to agree

that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police Custody under S. 167(2) of the Code is made out by the investigating agency."

The Supreme Court also made observations regarding the allegations of malafide in para 31 which reads as under:-

"31. In regard to anticipatory bail if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation

appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in State V. Captain Jagjit Singh, (1962) 3 SCR 622 : (AIR 1962 SC 253) which, though, was a case under the old S. 498 which corresponds to the present S. 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the

> egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose in consideration of the assurance that if arrested, he shall be enlarged on bail."(Emphasis supplied)

The Supreme Court, finally, in paragraph 33 of its said Judgment observed as under:-

> "33. We, would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under S. 438 by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application.

> It is customary, almost chronic to take a statute as one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted in their care by the legislature in its wisdom, if they err, they are liable to be corrected."

14. In the light of the ratio laid down by the Supreme Court in the aforesaid classic judgment which has stood the test of time and has been consistently followed till today, I shall now examine, keeping in view the aforesaid ratio and observations which are made by the Supreme Court, the facts and the submissions made by the learned Counsel appearing on behalf of the either side.

15. In my view so far as the applicants Dayanand Nayak and Shri Padte are concerned, this is not a fit case for grant of anticipatory bail. It is alleged in the FIR that the applicant Dayanand Nayak has amassed

wealth which is disproportionate to his known sources of income. Corruption by public servants has already riddled the social and moral fabric of the Society and is an evil which has to be firmly eradicated. The allegation in the FIR is that the public servant amassed wealth through setting up fictitious firms through his wife and withdrew amounts from the bank accounts of these firms with the help of his wife and his friend Shri Padte. On the one hand, the applicant Dayanand Nayak has a record of exemplary and meritorious service, yet, on the other hand, the details of the bank accounts of his wife reveal that huge monetary transactions have taken place during a long period of time. In my view, in public interest, it is essential to investigate further in the matter and it would not therefore be proper to grant anticipatory bail to the two aforesaid applicants. There is a possibility in this case, the applicant being a police officer, that grant of anticipatory bail may not result in a fruitful investigation being made in respect of the allegation in the FIR. The investigating agency, however, should provide adequate protection and security to the applicants Dayanand Nayak and Shri Padte as the fear expressed by their Counsel are not unwarranted and imaginary. The refusal to grant anticipatory bail does not in any way

take away the presumption which is provided by criminal law regarding the accused being presumed to be innocent till he is proved to be guilty in a free and fair trial. The applicants are, in any case, entitled to seek the remedy of seeking regular bail from the Court after their arrest. In my view the ratio of the judgments in Gurubaksh Singh Sibbia (supra), K.K. Jerath (supra) & Bimal Krishna Kundu (supra) will squarely apply to the facts of this case.

16. So far as the first submission of the learned Senior Counsel Shri Shirish Gupte appearing on behalf of the applicant - Dayanand Nayak is concerned regarding the fact that the custodial interrogation is not necessary, in my view, the said submission cannot be accepted. It is no doubt true that the filing of the FIR in the present case which was filed on 20/1/2006 had a chequered history which is followed by earlier accusations which are made against the applicant. Yet, the fact remains that the FIR cannot be said to be an encyclopedia in itself but is the initial step which is taken on the basis of which the investigation proceeds further. It is no doubt true that the meticulous details have been mentioned in the FIR and that the investigation itself has started on 3/12/2004 after the discreet investigation was

conducted by the Investigating Officer and, thereafter, the information was gathered and then the FIR had been filed, yet, that does not mean that the police and the Investigating Agency are precluded from investigating further in the allegations which are made in the complaint. It is no doubt true that, normally, in a case where allegations are made and the complaint is filed under section 13(1)(e) of the Prevention of Corruption Act, the custodial interrogation is not demanded by the Investigating Agency as it pertains to the collection of information regarding the various assets which have been acquired by the accused - public servant and, in such cases, rarely the question of discovery of fact as contemplated under section 27 of the Evidence Act arises or where a confession or recovery is to be made after custodial interrogation. Further, it is also true, as observed by the Supreme Court in the case of Gurbaksh Singh Sibbia etc. (supra) that in cases where such a discovery is made, even though the anticipatory bail is granted, the accused shall be deemed to have surrendered and the discovery or recovery is made at his instance. However, that principle cannot be applied as a general rule.

17. For deciding this submission of Shri Gupte, it

will be essential to have a brief over view of the relevant facts in the present case. The applicant - Dayanand Nayak arrived in Mumbai and through dint of hard work, study and labour, after having worked in hotels and in other establishments completed his secondary education and, thereafter, pursued his education, completed his graduation and successfully appeared and passed the examination conducted by the Public Service Commission and joined the Police Force in 1995. Soon thereafter, on account of his meritorious service, he was picked up by the Superior Officers in the Police Department on account of his bravery and other qualities which were noticed by them and he became the part of an elite group of Officers which came to be known as CIU Squad. During this period, he received various medals of honour and letters of appreciation from the echelons of his Department and the State Government. During this period of his career he got married in 1998 with Ms. Komal who was then working at Chennai and, thereafter, she came to Mumbai and she was transferred to one of the Offices in Mumbai where she continued to work. During this period, it is alleged by the prosecution that several assets were acquired by Dayanand Nayak in the name of his wife and several transactions were carried in the name of the firms which were either

owned by his wife or with which she was associated which ran in to hundreds of crores and it is alleged by the prosecution that, in fact, the money received by him as an illegal gratification was converted into official money through these firms and, therefore, it is alleged that the applicant - Dayanand Nayak amassed this wealth with the help of his wife and friend Shri Padte.

18. In the light of these allegations, it cannot be said that the Police cannot demand custodial interrogation.

19. So far as the second submission which is made by Shri Gupte, the learned Senior Counsel appearing on behalf of the applicant - Dayanand Nayak regarding the malafide action which has been initiated at the instance of certain persons who are his rivals in the department and some persons who are interested in removing the applicant from the Police Department and, therefore, have an ulterior motive is concerned, it does appear from the chequered history of the allegations which are made against the present applicant that their does appear to be an ulterior motive on the part of atleast one person who has been constantly making allegations against the present

applicant - Dayanand Nayak. It is an admitted position that one Ketan Tirodkar who is allegedly a journalist and a self confessed mediator of gangster known as Chhota Shakil who is wanted in several cases has constantly made allegations against the present applicant. Initially, the allegation was made by him that an amount of Rs 1 crore was donated by the applicant to School at his native place which was being run in the name of his mother. A High Level Committee was appointed on the basis of the said allegation and a thorough inquiry was made by the Department in which it was found that there was no truth in the allegations which were hurled against the applicant and it transpired that the applicant - Dayanand Nayak had donated Rs 10,000/- and the other money was collected voluntarily by various persons and the trust was formed in respect of the said School. Immediately, thereafter, the allegation was made by the said Tirodkar that the applicant was having links with the underworld and the said Tirodkar acted as a middleman and it was, therefore, alleged that the provisions of MCOC Act should be made applicable against the applicant. In this case also, the Police, after thorough investigation, gave a clean cheat to the applicant and did not include his name in the charge-sheet that was filed. Thereafter, a petition

was filed by Shri Tirodkar in this High Court in which various reliefs were claimed; one of them being that the Director General of Police should be directed to register a case under the provisions of section 13(1)(e) of the Prevention of Corruption Act. The said case is pending before the Division Bench. Be that as it may, the fact remains that the present complaint has been filed on 20/1/2006 and, as rightly submitted by Shri Borulkar, the learned Counsel appearing on behalf of the respondents, it cannot be said that the Police had acted in malafide manner because if the Department had any ulterior motive in implicating the applicant, it would have done so in the earlier allegations which were made against the applicant. Therefore, the submission that the allegations made in the complaint are cooked-up or are made with an ulterior motive cannot be said to be entirely true. In any case, it would not be possible to arrive at any definite conclusion at this stage. A perusal of the FIR discloses that it is alleged in the FIR that there are several transactions which need to be investigated particularly in cases where cheques have been deposited in the account of the wife of the applicant Dayanand Nayak and the amount in cash has been withdrawn by his wife or by Shri Padte who is alleged to be his friend and, therefore, in view of

the various allegations which are made in the FIR, further investigation and particularly custodial investigation in respect of the applicant Dayanand Nayak and the applicant Padte, in my view, would be essential and Police, therefore, cannot be precluded from carrying out the investigation subject to certain conditions being imposed by this Court, particularly in the light of apprehension expressed by the applicant Shri Dayanand Nayak regarding the danger to his life and to that of his family viz. his wife and son.

20. So far as the application which is filed by the wife of the public servant Smt. Komal Dayanand Nayak is concerned, in my view, a case has been made out for the grant of anticipatory bail subject to certain conditions which may be imposed by this Court.

21. The submissions made by the learned Counsel appearing on behalf the applicant - Smt. Komal Dayanand Nayak which have been reproduced in the preceding paragraph cannot be accepted in its totality at this stage as the correctness or otherwise of the allegations has to be investigated further after interrogation. The judgment on which the reliance is placed by the learned Counsel cannot be made

applicable to the facts of the present case since, in the said case, the Supreme Court had made those observtions after the evidence had been led and the trial was over. In the present case, we are at the stage of considering whether a case for anticipatory bail is made out or not.

22. In my view, so far as the applicant Smt. Komal Dayanand Nayak is concerned, her custodial interrogation is not necessary. Firstly, it is the case of the prosecution that she had been set up by her husband and the firms and the various accounts had been set up by her husband and she was used for the purpose of laundering the alleged illegal money. Since this is the main allegation against the wife of the applicant, in my view, the entire transactions, even according to the prosecution, were at the behest of Shri Dayanand Nayak and, therefore, if any information is to be sought or collected, the applicant Dayanand Nayak would be in a position to disclose such information on being interrogated by the police. It is not the case of the prosecution that the applicant Smt. Komal Dayanand Nayak had knowledge of certain things independent from what was known by her husband. If that be the case, Smt. Komal Dayanand Nayak can be interrogated for a period of 7

days from 11.00 a.m. to 5.00 p.m. during which period the Investigating Agency can ask an explanation from her regarding various queries which it has regarding the said accounts. For that purpose, in my view, her custodial interrogation will not be necessary and after interrogating her for a period of 7 days from 11.00 a.m. to 5.00 p.m., she can be called by the Investigating Agency at any time during reasonable hours i.e. from 11.00 a.m. to 5.00 p.m. as and when necessary after giving due notice to her. It must be clarified that, that does not mean that the submission regarding explanation which is given by her Counsel Shri Mundargi has been either accepted or rejected.

23. So far as the third applicant Shri Padte is concerned, the submissions which are made by the learned Counsel Shri Marwadi also cannot be accepted. In my view, the custodial interrogation of the applicant may be necessary particularly in the light of what is mentioned in the FIR regarding withdrawal of Rs 13 lakhs by this applicant from the Bank Account of Smt. Komal Dayanand Nayak at the instance of the applicant Shri Dayanand Nayak. Though it was strenuously urged that the statement which was made by Shri Padte was incorrectly recorded by the

Investigating Officer and that he had never made such a statement, in my view, it would be essential for the Investigating Agency to probe into this aspect of the matter and solicit answers on queries which are raised.

24. In the result the following order is passed:-

O R D E R

(i) The application for anticipatory bail filed by Shri Dayanand Nayak vide Criminal Application No. 425 of 2006 is rejected. However, the Investigating Agency is directed not to place the applicant in custody alongwith any other local or regular hardened criminal but should be kept in a separate custody and necessary security arrangements should be made in order to ensure that there is no danger to his life. The applicant to be medically examined by the doctor every day in the morning and a report to that effect may be submitted to the concerned Court. With these directions application is rejected.

(ii) The anticipatory bail application filed by Shri Padte vide Criminal Application No. 427 of 2006 is also rejected. However, the same conditions which are

made applicable in respect of Shri Dayanand Nayak would apply in respect of the applicant Shri Padte.

(iii) So far as the Criminal Application filed by Smt. Komal Dayanand Nayak vide Criminal Application No. 426 of 2006 is concerned, the said application is allowed and, in the event of arrest of the applicant Smt. Komal Dayanand Nayak in connection with the offence which is registered by Anti-corruption Bureau and its allied Wings under the provisions of section 13(1)(e) of the Prevention of Corruption Act dated 20/1/2006 or any other offence registered under the other Act pertaining to the same allegations, would be released on bail in the sum of Rs 25,000/- with one or two sureties in the like amount. The pass-port of Smt Komal Dayanand Nayak, as submitted by the learned Counsel Shri Marwadi, has been already deposited with the Joint Commissioner of Police in December, 2003. The applicant not to leave the City of Mumbai without permission of the Court. The applicant to report to Investigating Officer Shri Bhonge, ACP, ACB, Mumbai at Worli from 13/2/2006 between 11.00 a.m. to 5.00 p.m. She may be permitted to take her counsel who shall remain present in the Head Quarters and sit in the Office of Shri Bhonge, ACP during this period of one week. Thereafter, Smt. Komal Dayanand Nayak may be

called for interrogation once in a week from 3.00 p.m. to 5.00 p.m. after giving 48 hours notice to her and during this period also she may be permitted to take her Counsel who may sit in the office of Shri Bhonge ACP, ACB, Mumbai at Worli.

(iv) It is clarified that any observation made by this Court while deciding the aforesaid three applications should not be construed to mean that the submissions which are made by the learned Counsel appearing on behalf of the applicants or by the Chief Public Prosecutor are either accepted or rejected and these observations have been made only for the purpose of deciding the applications which are filed by them. It is made clear that the Special Court or the concerned Court shall not be influenced in any manner by any such observation and if applications for bail are filed by the applicants, their applications shall be considered on their own merits. It need not be stated that the parameters for grant of anticipatory bail are entirely different and the same parameters will not apply to the application for regular bail. The said observation has been made only for the purpose of determining the applications either for granting or rejecting the said applications for anticipatory bail.

(v) The learned Counsel appearing on behalf of Shri Dayanand Nayak and Shri Padte requests that the interim order which is passed by this Court may be continued for an appropriate period of time. This is vehemently opposed by the learned Chief Public Prosecutor Shri Borulkar. It is submitted that there is every possibility of further tampering with the evidence. In my view, no prejudice would be caused if some time is granted to the applicants to surrender. Considering the fact that the discreet investigation in this case had commenced on 3/12/2004 and it continued almost for more than one year and also considering the fact that further investigation is being monitored by the Division Bench of this Court in Writ Petition No.64 of 2006 in which an order has been passed on 31st January, 2006 where the Division Bench has directed the investigating authority to submit a report every two weeks, in my view, the interim order therefore be continued for a period of one week. It is however made clear that the applicants shall not leave the City of Mumbai without permission of this Court during this period.

(vi) Applications are accordingly disposed of.

V.M. KANADE, J.